

JUL 18 1985

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No. 84-1044

**IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1984**

PACIFIC GAS AND ELECTRIC COMPANY,

Appellant,

vs.

**PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA,**

Appellee.

On Appeal From the
Supreme Court of California

**BRIEF OF
AMICUS CURIAE
WISCONSIN CITIZENS' UTILITY BOARD**

Lee Cullen
CULLEN, WESTON & PINES
Attorneys for Wisconsin
Citizens' Utility Board
20 North Carroll Street
Madison, Wisconsin 53703
(608)251-0101

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INTEREST OF AMICUS CURIAE

The argument posed by appellant PG&E consistently speculates about the constitutional consequences and pragmatic problems that would supposedly result in the future if ratepayer organizations were periodically allowed to include their messages in the utility's billing envelope. In its Jurisdictional Statement PG&E refers to: 1) hypothetical future messages of intervenor, TURN [Toward Utility Rate Normalization]; 2) the recently passed CUB initiative in Oregon; and 3) proposed enclosure procedures in New York and Nevada. (J.S. p. 10)

Yet PG&E is silent when it comes to discussing the nation's first experience with such enclosures -- that of Wisconsin's Citizens' Utility Board (CUB). In its five year history, Wisconsin's CUB has included 91 enclosures in the periodic customer billings of the 36 utilities which CUB statutorily "watchdogs" on behalf of residential ratepayers.

There are significant historical and structural differences between TURN and a Citizens' Utility Board such as Wisconsin's CUB -- differences which understandably and properly reflect the right of each state to address the interests of economically captive utility ratepayers with a mechanism of the state's choice. However, Wisconsin CUB's five year experience with including enclosures in utility bills provides a relevant empirical basis for evaluating and rejecting many of the fundamental legal and logistical concerns raised in this case.

The Specific Structure Of Wisconsin's CUB

Created by the Wisconsin legislature, the Wisconsin Citizens' Utility Board is a non-profit "public body corporate and politic," established pursuant to Chapter 72, 1979 Wisc. Laws 457, effective November 29, 1979. A summary of relevant provisions in the CUB enabling

statute is included as Attachment 1. A summary of CUB's most recent Annual Report is included as Attachment 2.

CUB has been expressly determined by the legislature to have:

"a statewide interest and not
a private or special concern."
(Wis. Stats. §199.02)

Summary Of The Nature Of The Wisconsin CUB

Although established by the legislature, CUB is not a state agency and receives no tax dollars. CUB is governed by a board of directors whose eligibility requirements, composition, and election procedures are specifically and statutorily determined. In its more than 5 year history, in excess of 118,000 citizens have joined CUB. Membership eligibility standards and dues levels are likewise set forth in the CUB enabling statute, as are specific stringent duties not imposed on traditional citizen organizations. For example, CUB may not support political candidates. It has also been determined that CUB is subject to Wisconsin's Open Records Law and its Open Meetings Law.¹

CUB's state-granted right to periodically include enclosures in the utility bill is the fulcrum of its **statutory responsibilities:**

- * to represent and protect residential ratepayers
- * to inform them of utility service costs and
- * to inform them of the procedures for becoming CUB members

1. In response to CUB's March 9, 1984 inquiry, Attorney General Bronson C. LaFollette issued an informal opinion on April 12, 1984 in which he concluded that CUB is subject to the Wisconsin Open Records Law [Wis. Stats. §19.32 - 19.37]; and is subject to the Wisconsin Open Meeting Law [Wis. Stats. §19.81 - 19.98].

SUMMARY OF ARGUMENT

"EVERYONE IS IN FAVOUR OF FREE SPEECH. HARDLY A DAY PASSES WITHOUT IT BEING EXTOLLED. BUT SOME PEOPLE'S IDEA OF IT IS THAT THEY ARE FREE TO SAY WHAT THEY LIKE, BUT IF ANYONE SAYS ANYTHING BACK, THAT IS AN OUTRAGE."

Winston Churchill,
Speech before the House of
Commons, October 13, 1943.

Appellant PG&E and its amici colleagues are outraged. PG&E and its amici contend: 1) that it would be an unconstitutional departure from tradition to suddenly force a public utility to include in the utility envelope messages with which it disagrees and 2) that such a requirement would pose inequitable cost and logistical burdens on the utility.

This brief will address the historical inaccuracy of both conclusions, and in so doing will share with the Court a practical description of Wisconsin's CUB's more than five years of experience in periodically inserting enclosures in utility bills.

I. ARGUMENT

BECAUSE PUBLIC UTILITIES ARE REGULATED MONOPOLIES, THEY ARE ROUTINELY REQUIRED TO INCLUDE MESSAGES IN THE UTILITY ENVELOPE WHETHER OR NOT THEY AGREE WITH THOSE MESSAGES.

A chronicle of the history of utility regulation is a dramatic reminder of the serious public policy

considerations which emerge because public utilities are sanctioned by the state as monopolies. Insulated from competition, public utilities enjoy a wide range of privileges and economic advantages that competitive businesses and entrepreneurs can only dream of -- advantages including the exclusive right to provide a basic customer service in a specific geographical territory; the right of eminent domain; and a lower cost of capital -- to name but a few. Although public utilities are directed to provide adequate service at reasonable rates, customers are deprived of the competitive protections of the marketplace.

In its Jurisdictional Statement, PG&E assumes that with respect to periodic customer billings it should be treated by the state no differently than the Bank of America (J.S. p. 11). That comparison is inherently flawed in that it fails to distinguish between a competitive business and a monopoly utility. Dissatisfied customers of the Bank of America can pull their money out and go down the street to the bank, credit union or savings & loan institution of their choice. But customers of gas, electricity, water and local telephone utilities are economic captives. They cannot switch to competitors if they object to unfair rates or unsatisfactory service.

The identical public interest considerations which early in this century led to the extraordinary state sanctioning of public utilities as monopolies also compelled states to regulate public utilities.² As part

2. For a historic discussion of the economic and legal rationale of the regulation of public utilities (including examples of how utilities are distinguished from other businesses because of the advantages they enjoy) see:

Paul J. Garfield and Wallace F. Lovejoy, Public Utility Economics (Englewood Cliffs, New Jersey: Prentice-Hall, 1983), pp. 1-3; Barry M. Mitnick, The Political Economy of Regulation (New York:

of that exercise of authority, commissions regularly require utilities to carry messages in the utility envelope -- whether or not the utility agrees with that message.

Does anyone think that utilities want to tell ratepayers of:

- *their right to attend public hearings and to protest proposed rate hikes
- *their right to have their deposit returned with interest
- *their right to a rate refund
- *eligibility standards for obtaining free weatherization and retrofit services?³

As a proper extension of their regulatory responsibilities, commissions are authorized to assess non-utility related messages from other entities so as to determine whether and how such costs should be

(cont.)

Columbia University Press, 1980), pp. 88-94; Li Way Lee, "A Theory of Just Regulation," The American Economic Review 70 (5) (1980), pp. 848-862; James Q. Wilson, "The Politics of Regulation," Social Responsibility and the Business Predicament, James W. McKie, ed. (Washington, D.C., The Brookings Institution, 1974), pp. 135-168; Clair Wilcox and William G. Shepherd, Public Policies Toward Business, 5th ed. (Homewood, Ill: Richard D. Irwin, 1975) pp. 333-350; Douglas Needham, The Economics and Politics of Regulation (Boston: Little, Brown and Company, 1983) Chapter 2 "Reasons for Regulation"

3. Examples of Wisconsin Public Service Commission-mandated notices: Wis. Adm. Code, S. PSC 2.73(1); [requires notice of rate requests]; 113.12(4) [electric deposit and dispute rules]; 134.05(4) [gas deposit and dispute rules]

allocated between ratepayers and shareholders. Consolidated Edison Co. v. Public Service Commission, 447 U.S. 530 (1980).

To conclude that regulators of monopolies cannot require the inclusion of messages with which the utility disagrees is to implicitly conclude that regulatory agencies and licensing boards of non-monopolies (such as banks, insurance companies, etc.) could not require messages in their periodic billings with which the regulated company may disagree. Such a conclusion would turn regulatory and administrative law on its head.

II. ARGUMENT

IN A RATIONAL EXTENSION OF THE STATE'S POWER TO PROTECT MONOPOLY RATEPAYERS, STATES ALLOW DESIGNATED RATEPAYER ORGANIZATIONS ACCESS TO THE UTILITY BILLING ENVELOPE.

- A) UTILITIES THEMSELVES RECOGNIZE THE BILLING ENVELOPE AS THE PRACTICAL AND OPTIMUM METHOD FOR COMMUNICATING WITH RATEPAYERS.

Common sense and practical considerations make clear that the utility billing envelope is the mechanism most likely to reach the maximum number of ratepayers. The utilities themselves use a variety of methods for getting their messages to the ratepaying public: speakers' bureaus, print and electronic media, bumper stickers, distribution of promotional materials to school children and civic organizations, etc. As recognized by the the utilities, it is the utility envelope which is the most effective mechanism.

For example, in the discovery phase of a recent Madison Gas and Electric (MG&E) rate case, CUB secured a customer survey⁴ which MG&E had performed to determine the comparative effectiveness of different methods of communicating with ratepayers. MG&E's survey concluded that bill stuffers were even more effective in reaching ratepayers than television, radio, or newspaper advertising.

"CUSTOMER SATURATION BY MEDIUM"

Newspaper	41%
TV	68%
Radio	32%
Billing Stuffer	81%*

*"When asked about the bill stuffers on conservation, 81% responded that they had not only seen, but had read energy conservation materials included with the bill."

- B) NON-UTILITY RELATED ORGANIZATIONS SEEK OUT THE UTILITY BILLING ENVELOPE IN THEIR DESIRE TO REACH LARGE NUMBERS OF PEOPLE IN THE MOST COST EFFECTIVE MANNER.

Even the Federal Government, for example, has sought access to the utility envelope. The

4. MG&E response to CUB Data Request No. 15, Docket No. 3270-UR-12

Wisconsin Public Service Commission has had to wrestle with the issue of two Wisconsin telephone companies having placed Selective Service draft registration notices in the utility bill.⁵

In its brief, PG&E says "...the limited space in (its) billing envelopes, which has always been limited to PG&E's private use and occasional legal notices, cannot accommodate outside speakers without governmental entanglement in selecting the speakers." (Br. 20) (Emphasis supplied).

In light of that strong PG&E statement, it is difficult to reconcile PG&E's recent decision⁶ to allow the National Center for Missing and Exploited Children to use PG&E's billing envelope. According to George Lawrence, President of amicus American Gas Company, AGA is helping coordinate an effort that may lead to photographs of missing children being included in gas bills by most of AGA's 300 member gas utilities. Thus each state commission will undoubtedly soon have to review this non-utility related message under its own standards and determine what cost allocation implications it poses. A copy of the relevant wire story is included as Attachment 3.

C) AS A RATIONAL COROLLARY TO CUB'S
STATE-MANDATED OBLIGATIONS, THE
WISCONSIN LEGISLATURE EXPRESSLY

5. Wisconsin Public Service Commission Docket: Proposed Tariff On Small Bill Inserts (1983)

6. In a July 11, 1985 telephone conversation, CUB Program Director, Gary Becker, was told by American Gas Association (AGA) Communications Department representative, Wendy Jones, that PG&E is among the AGA participants in the "Missing Children" promotion.

ALLOWS CUB TO INCLUDE AN ENCLOSURE IN THE UTILITIES' PERIODIC CUSTOMER BILLING ENVELOPE TWO TIMES PER YEAR.

Like the PSC, Wisconsin CUB does not have access to the mailing lists of the utilities.

Like the utilities, CUB recognizes that anything short of an enclosure would not reach the maximum number of ratepayers.

Like the PSC, Wisconsin CUB is directed by the state to assume a very specific role in the ratemaking and consumer education process and of necessity must communicate with ratepayers to fulfill that role. The state provided CUB with the enclosure right so those mandates could be effectively achieved.

Unlike the utilities, CUB does not have the economic resources to tap every communication resource — television, radio, newspaper, direct mail, speakers' bureaus, promotional literature and bill stuffers. If ratepayers had the practical opportunity to organize themselves and accumulate anything close to those levels of resources, the state would not have needed to create a CUB in the first place.

At the time CUB legislation was being considered in Wisconsin, the PSC Chairman, Charles J. Cicchetti, explained:

"I believe the advocacy equation is unbalanced. The staff is in the middle, and in Wisconsin I believe it performs exceptionally well in this objective capacity. But utility companies hire numerous highly-paid consultants and outside counsel

to complement their own staff experts and attorneys. This is not wrong, but citizens should also have an effective advocate. This should be outside of government."

"I further believe the quality of citizen intervention will be improved if greater resources are put in the hands of citizen intervenors."

"But, even in Wisconsin, most intervenors cannot put on a positive case, which is an organized presentation of testimony on one or more alternatives. Because of this, they must use the technique of a negative case, which depends upon cross-examination and court appeals as the tools of advocacy. This type of case is time consuming and does not always improve regulation. CUB would focus resources to improve the regulatory climate for electric and gas utilities, intervenors and Commission alike." (Letter to Senator Dorman, March 22, 1978.)

Chairman Cicchetti's views were echoed by his colleague, Commissioner Edward M. Parsons, Jr.

"Very little, if any, expert testimony is provided by consumers. Such persons or groups are lacking in the expertise and financial underpinnings necessary to put in a solid case."

"Consumer input organized in the most efficient form is essential if we are to reduce regulatory lag and if the Commission is to be provided with the most informed data which will be the basis for its decisions. The most viable proposal I have seen for Wisconsin is the Citizens Utility Board. It is for these reasons that I recommend the CUB legislation for adoption by the Wisconsin Legislature." (Letter to Representative Wahner, February 10, 1978.)

This was typical of voluminous testimony supporting creation of a Wisconsin Citizens' Utility Board. Such legislation was in keeping with Wisconsin case law which recognizes that the role of the PSC is to be a judge, not an advocate for any one interested party, including

the ratepayer.⁷

III. ARGUMENT

THE DAY-TO-DAY PRACTICAL LOGISTICS OF THE CUB ENCLOSURES DEMONSTRATE THAT PG&E'S ANXIETIES ARE MISPLACED.

- A) THE INCLUSION OF CUB ENCLOSURES HAS NOT HINDERED THE UTILITIES FROM SPEAKING TO RATEPAYERS.

7. PSC May Not Advocate One View: Muench v. PSC (261 Wis. 492) (August 1951) "...To hold that the PSC should not only decide between these conflicting interests in its judicial capacity but also should represent the state in protecting public rights would make the commission judge and advocate at the same time. Such a concept violates our sense of fair play and due process..."; Wisconsin Telephone v. PSC (232 Wis. 274) (August 1939) "...the commission should make every effort to act in a fair and impartial manner...they represent the interests of the state and are not concerned with anything but the establishment of a lawful and reasonable rate. They are not, as attorneys are, endeavoring to win a case...". PSC Staff Must be Impartial: Wisconsin Telephone v. PSC (supra): "The commission is of course charged with the duty of seeing that the work of its staff is done in a fair and impartial manner if it is to be accepted as a basis of decision..." PSC 2.32 (2) "Members of the commission staff appear neither in support nor opposition to any cause, but solely to discover and present, if necessary, facts pertinent to the issues." PSC Commissioner Matthew Holden, Waukesha Freeman 3/30/77 "The Commission staff is supposed to represent the public interest from a variety of points of view...it functions mainly as an information gatherer." (p.3)

The state has not deprived the utilities of their access to the "soapbox" which a utility billing envelope represents. The state is only saying that this soapbox should be shared with the intervenor designated to represent economically captive ratepayers who pay for that envelope.

The state is not restricting the time, place, manner, or even content of the utilities' messages. It is properly promoting a wider and more spirited debate of important public issues.

Wisconsin CUB has used 31 enclosure texts in 91 enclosure cycles during the past five and one-half years. Yet amici WSTA and Wisconsin Bell single out only one text as a "horror story" (WSA/Wis. Bell Br. pp. 2, 11). In an enclosure sent to gas, electric and telephone companies, CUB explained its opposition to a recent FCC long-distance access charge decision.

No Wisconsin utility formally or even informally objected to CUB or to the PSC about that text -- a text which includes language explicitly saying:

"CUB SAYS THERE IS NO ECONOMIC OR LOGICAL JUSTIFICATION FOR A LONG DISTANCE ACCESS FEE. BUT DON'T BLAME THE PSC OR (NAME OF UTILITY)."

Indeed, the amici Wisconsin telephone companies have not supported the long distance access fee which was the subject of this supposedly controversial enclosure text.

It should also be remembered that the utilities still have (and frequently utilize) the "last word" in the billing envelope. As part of CUB's

enclosure process, the exact text of CUB's enclosure is in the possession of the utility six to eight weeks before the actual enclosures are delivered to their loading dock for stuffing. And the utilities have often taken advantage of their opportunity to respond to CUB's enclosure right in the very same month's billing envelope that contains CUB's enclosure. In the past four months alone, two major utilities have done just that.⁸ Each utility is able to informally and formally challenge the language of CUB's enclosure.⁹

B) THE UTILITIES ARE NOT "COMPELLED TO ASSOCIATE"

Appellant PG&E is concerned that it would be "compelled to associate" with TURN and would be victimized by the fact that confused ratepayers would think the TURN message is from PG&E. Even without a disclaimer, it is hard to imagine that ratepayers would read a TURN message and mistake it for a utility communication. There certainly has been no such problem in Wisconsin. Indeed, if the CUB enclosures were being mistaken for a pro-utility message, it is difficult to conceive that utilities would be so virulent in their anti-CUB literature.

Practical considerations are also relevant. Wisconsin law imposes no such disclaimer requirement on CUB, but as a logical marketing practice, CUB enclosures prominently tell the reader on the outside of the envelope:

8. Wisconsin Electric Power Co. (April 1985); Wisconsin Power & Light Co. (May 1985).

9. Wisconsin Public Service Commission Directive (January 20, 1984).

"THIS MESSAGE IS NOT FROM YOUR UTILITY!"

After all, why would a ratepayer intervenor risk being confused with a utility?

C) COST CONSIDERATIONS

The CUB enclosures do not impose additional costs on the utility or its shareholders.

Printing Costs

CUB prints and pays for the enclosures independently of the utility.

Administrative Costs

CUB has reimbursed utilities for the costs (including interest) the utilities have incurred in administering CUB's enclosure. Those reimbursement costs have ranged from \$250 to \$1,300 per enclosure cycle.

Postage Costs

CUB'S enclosure has always weighed 1/10 of an ounce. Only once has there been a postage dispute (following close on the heels of the new billing procedures associated with the divestiture of AT&T). This \$2,000+ dispute is in litigation.¹⁰

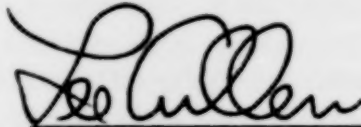
10. Citizens' Utility Board v. Wisconsin Bell, Inc., Case No. 84-CV-4693.

CONCLUSION

In a rational extension of the state's power to protect monopoly ratepayers, states allow designated ratepayer organizations access to the utility billing envelope. Such ratepayer messages impose no time, place, manner, or content restrictions on the utility.

Such enclosures promote vigorous public debate of important issues through a mechanism which enhances public participation in the ratemaking process. Neither the utilities nor their shareholders incur additional costs because of the enclosure, nor does the enclosure unconstitutionally force the utility to "associate" with the ratepayer intervenor.

Respectfully submitted,



Lee Cullen

CULLEN, WESTON & PINES
Attorney for the Citizens'
Utility Board
20 North Carroll Street
Madison, Wisconsin 53703
(608)251-0101

July 19, 1985

ATTACHMENT 1

Relevant Provisions Chapter 199

PURPOSE

CUB's statutory purpose:

"is to promote the health, welfare and prosperity of all the citizens of this state by ensuring effective and democratic representation of individual farmers and other individual residential utility consumers before regulatory agencies, the legislature and other public bodies and by providing for consumer education on utility service costs and on benefits and methods of energy conservation. Such purpose shall be deemed a statewide interest and not a private or special concern." Wis. Stats §199.02.

CUB represents the customers of Class A utilities (gas, electric, or water utility with an annual gross operating revenue of \$2.5 million or more or any telephone utility with annual total gross operating revenues of \$1,600,000 or more on November 29, 1979. §199.03(4). CUB does not represent the interests of the customers of municipally-owned utilities or cooperatives.

DUTIES

Among the many duties the state has imposed on CUB are the obligations to:

*Represent and protect the interests of the residential utility consumers of this state. §199.05(2)(a)

*Inform, insofar as possible, all residential utility consumers about CUB, including the procedure for obtaining membership in CUB. §199.05(1)(b)

ATTACHMENT 1
Continued

*Make available to all residential utility consumers information on utility service costs and on benefits and methods of energy conservation. \$199.05(1)(c)

*To intervene as a party or otherwise participate on behalf of residential utility consumers in any proceeding which affects the interests of residential utility consumers. \$199.05(2)(d)

RESTRICTIONS

Non-Partisan

In creating CUB, the legislature expressly stated that CUB must be nonpartisan and

"may not sponsor, endorse, or otherwise support nor may it oppose any political party or the candidacy of any person for public office."
\$199.15

Other Requirements

The legislature specified the manner in which CUB's board of directors would be elected (\$199.12); required an annual membership meeting to be held in different districts on a rotating basis (\$199.08); set the eligibility and dues structure for membership (\$199.0491); and subjects CUB to Public Records requirements (\$199.125).

ATTACHMENT 2

CUB 1984
ANNUAL REPORT
(SUMMARY)

MEMBERSHIP:	More than 118,000 residential utility consumers have joined CUB.
REVENUES:	\$754,011
CUB PARTICIPATION IN PSC RATE CASES AND GENERIC PROCEEDINGS:	30 proceedings
CUB PARTICIPATION IN LITIGATION:	4 Lawsuits
CUB LEGISLATIVE ACTIVITIES:	8 issues
CUB CONSUMER EDUCATION PROJECTS:	7 projects
CONSUMER COMPLAINT AND INQUIRIES:	CUB responded to hundreds of complaints and inquiries regarding the service of virtually every major utility (14) in addition to dozens of smaller utilities.
PUBLIC APPEARANCES:	More than 100.

ATTACHMENT 3

Wisconsin State Journal
April 4, 1984

'Missing' photos in gas bills

© Orlando Sentinel

WASHINGTON — Missing-children photos will be tucked into gas bills by utilities around the country.

"This campaign is a natural evolution of efforts launched to date," Jay Howell, executive director for the National Center for Missing and Exploited Children, said Wednesday. "With this campaign, we are targeting the whole country."

Four months ago, the center and milk distributors began putting missing-children photos on milk cartons.

Some 60 gas utilities in 42 states agreed to put pictures of two missing children in the bills each month.

George Lawrence, president of the American Gas Association, which is helping coordinate the effort, said most of the group's 300 member companies will join soon.

Nancy Reagan will be honorary chairwoman of the National Child Watch Campaign.

Sen. Paula Hawkins, R-Fla., who spent this week strengthening her claim to the title of the "children's senator," expressed the hope that the campaign not only would lead to clues about missing children but would encourage parents to have their children photographed and fingerprinted.

On Wednesday, she attended a conference to promote awareness of exploited and missing children.

On Tuesday, she introduced legislation that seeks to provide no-fault compensation for children who have adverse reactions to vaccines. The bill also seeks to ensure improved safety standards and adequate supplies of medicine.

She has introduced a bill that would institute special legal procedures for prosecuting child molesters. These procedures are designed to spare and protect children from the trauma of cross-examinations and courtroom confrontations with defendants.

The related issues of vaccine and compensation provoked controversy. With courts awarding large settlements to victims, insurance costs escalated, prompting drug companies to withdraw from the vaccine market. Less competition reduced the supply of vaccines and increased costs.